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States Government

Department of Energy

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SEP 29 1 07 PM '93 Rocky Flats Office

## ACTION

DIST LTR ENC

BENEDETTI, R.L.	
BENJAMIN, A.	
BERMAN, H.S.	
CARNIVAL, G.J.	
COPP, R.D.	
CORDOVA, R.C.	
DAVIS, J.G.	
FERRERA, D.W.	
FRANZ, W.A.	
HANNI, B.J.	
HEALY, T.J.	
HEDAH, T.G.	
HILBIG, J.G.	
KIRBY, W.A.	
KUESTER, A.W.	
MANN, H.P.	
MARX, G.E.	
McKENNA, F.G.	
MORGAN, R.V.	
PIZZUTO, V.M.	
POTTER, G.L.	
RILEY, J.H.	
SANDLIN, N.B.	
SATTERWHITE, D.G.	
SCHUBERT, A.L.	
SETLOCK, G.H.	
SULLIVAN, M.T.	
SWANSON, E.R.	
WILKINSON, R.B.	
WILSON, J.M.	

SEP 27 1993

ERD:SRG:11140

Notice of Violation for OU2 Notification as per September 16, 1993 Secretarial Guidance

Associate Deputy Secretary for Field Management, FM-1, HQ

General Counsel, GC-1, HQ

Assistant Secretary for Environmental Restoration and Waste Management, EM-1, HQ

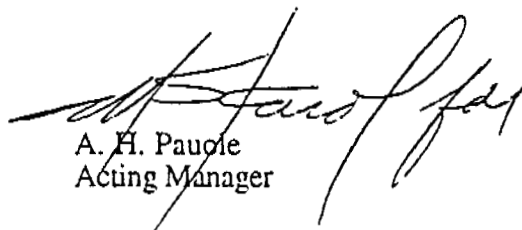
Assistant Secretary for Environment, Safety and Health, EH-1, HQ

In compliance of the September 16 and August 18, 1993 memoranda from the Secretary, we are providing 10-day follow-on information from our September 13, 1993 memorandum (ERD:HR:10795, attached). This information is required within 10 days of a Notice of Violation, as specified in the guidance information entitled: "Guidance on Management Procedures for Addressing responsibility for Violations of Environmental Requirements and Related Fines and Penalties."

The Notice of Violation was received September 10, 1993 (attached) from U.S. Environmental Protection Agency (EPA) and the Colorado Department of Health (CDH) for missing a milestone under our InterAgency Agreement (IAG). The missed milestone is for the Final RCRA Facilities Investigation/Remedial Investigation (RFI/RI) Report for Operable Unit 2 (903 Pad, Mound, and East Trenches).

In consultation with EM-40, we have agreed to dispute the Notice of Violation through the Dispute Resolution process laid out in the IAG. The basis of the dispute is that we have not missed the August 9, 1993 milestone for the Final RFI/RI Report at this time (due to an August 12, 1993 (attached) EPA/CDH "stop the clock" authorization on the schedule as of June 21, 1993), but will miss it in the future. Once the schedule "stop the clock" has been lifted, we will miss the milestone by approximately nine months, this makes us subject to additional stipulated penalties of up to \$355,000 (1 week at \$5,000 and 35 weeks at \$10,000).

We will keep all parties informed on the progress on the Dispute with EPA and CDH. If you have any questions about this, please contact James Hartman at 966-5918.

  
A. H. Paule  
Acting Manager

Attachments

CORRES CONTROL x x

PATS/T130G

Adm Rec. X

Reviewed for Addressee  
Corres. Control RFP9-28-93  
DATE BY

Ref Ltr. #

DOE ORDER # 5400

ADMIN RECORD

BZ-A-00045

SEP 27 1993

cc w/Attachment:

A. Rampertaap, EM-453  
R. Schassburger, ERD, RFO  
M. Roy, OCC, RFO  
H. Rose, ERD, RFO  
S. Grace, ERD, RFO  
N. Hutchins, EG&G  
W. Busby, EG&G  
A. Primrose, EG&G

Within 24 hours:

(A) The nature of the alleged violation and of the environmental threat posed thereby:

The nature of the violation is the failure to meet the InterAgency Agreement (IAG) milestone for submittal of the Final RCRA Facilities Investigation/Remedial Investigation (RFI/RI) Report for Operable Unit 2 (903 Pad, Mound, and East Trenches). We missed the milestone for the Draft RFI/RI Report, due March 12, 1993 and as a result we are missing subsequent milestones. The Final RFI/RI Report, due August 9, 1993, is the second milestone to be missed for Operable Unit 2. We received the Notice of Violation on September 10, 1993 (attached).

There is no immediate environmental threat posed by this alleged violation of the IAG.

(B) whether the alleged violation has been corrected, or is continuing:

The alleged violation is continuing. The U.S. Environmental Protection Agency (EPA) and Colorado Department of Health (CDH) have told us verbally, that once they receive the Draft RFI/RI Report, they will assess the amount of the stipulated penalties and then correct the schedules to put us back "on track."

(C) the basis for the regulatory authority's discovery of the alleged violation (e.g., Department or contractor self-reporting or external regulatory inspection):

We informed the EPA and CDH in writing on August 12, 1993 that we were going to miss the milestone for the Draft as well as the Final RFI/RI Reports.

(D) whether fines or penalties are being assessed and, if so, the amount; and

We have been notified that once we submit the Draft RFI/RI Report, the regulators will assess the amount of the stipulated penalties. We are subject to stipulated penalties of up to \$5,000 for the first week, and \$10,000 a week thereafter for each missed milestone. Since the stipulated penalties are "additive," and we will be subject to the \$5,000 and \$10,000 amounts for each missed milestone. We won't know the actual amount until we meet the milestones and negotiate with EPA/CDH.

Before the "stop the clock" authorization from the regulators was received, we were anticipating approximately a nine month delay in both the Draft and Final RFI/RI Reports. Once the schedule is resumed, we still anticipate a nine month delay. This would make up subject for up to \$355,000 for each missed milestone (one week at \$5,000 and 35 weeks at \$10,000 equals \$355,000), or \$710,000 in stipulated penalties.

(E) whether duplicative notices were issued to the Department and to a contractor for the same alleged violation.

The notice was sent to DOE only.

Within 10 working days:

(A) the degree of responsibility of the Department and its contractor for the alleged violation, regardless of who received the notice;

In this case, DOE has accepted responsibility for the violation of the IAG for missing the milestone for the Draft RFI/RI Report. This is based upon the March 29, 1993 memorandum from R. P. Whitfield to the Acting Manager, Rocky Flats (attached).

(B) whether the Operations Office or any affected contractor disagrees with the legal or factual grounds for the alleged violation;

Although we have told the EPA and CDH that we agree to the stipulated penalties for missing the milestone for the Draft RFI/RI Report, we disagree that we are currently in violation of the milestone for the Final RFI/RI Report.

A "stop the clock" authorization was received from EPA and CDH on August 12, 1993 (attached), that, retroactively stopped the schedule as of June 21, 1993. Since the missed milestone date for this alleged violation was August 9, 1993, we maintain that we have yet to miss the milestone. However, once the schedule is restarted, we will ultimately miss the milestone.

(C) whether the issuing regulatory authority's proposed resolution should be accepted, or whether an attempt should be made to contest the notice or to negotiate a different settlement; and

In coordination with EM-40, we have agreed to dispute the notice of violation. The Dispute will follow the Dispute Resolution process laid out in Part 19 of the IAG. We will argue that the schedule was stopped as of June 21, 1993, therefore, we could not have missed the August 9, 1993 date at this time.

We emphasize that although not currently in violation of the IAG milestone for the Final RFI/RI Report, once the clock is restarted, we will ultimately miss the milestone.

(D) the actions taken, or proposed, to prevent similar alleged violations from occurring in the future.

The primary reason for the missed milestone for the Draft RFI/RI Report was the failure to coordinate with EPA/CDH in a timely manner to resolve the FY92 funding/scope-increase issue and to reach agreement on a schedule extension. We have since developed a closer working relationship with EPA/CDH to identify issues, early on, that potentially impact IAG deliverables and milestones.

As noted in D above, we maintain that have not currently missed the milestone. However, we will be in the future, once we revise the schedule can be determined.

# memorandum

DATE: MAR 29 1993

REPLY TO: EM-453 (A. Rampertap, 3-B191)

SUBJECT: Rocky Flats Response to the Regulators Regarding Notice of Violation

TO: Acting Manager, Rocky Flats Office

On March 16, 1993, a Notice of Violation (NOV) for missing an Operable Unit (OU) 2 Interagency Agreement (IAG) schedule milestone was received from the Environmental Protection Agency and Colorado Department of Health. The Department of Energy (DOE) has no current plans to protest the fines. Although the exact amount of the fines is currently not known, it is believed that the fines will be reasonable.


The DOE response to the NOV and change to the IAG milestone schedules must be as follows:

- Formally notify the regulators that DOE will accept fines and penalties associated with the NOV without dispute. Point out that, when they are determining the amount to assess, they consider that the funds expended on penalties reduce the amount available for environmental restoration.
- Immediately initiate a series of meetings with staff level regulators to describe in detail the project management, baseline, and change control process, and to jointly define the exact procedures that will lead to their involvement in the process. These may include participation in the formulation of roadmap issues, assumption development, and membership on the Field Office Change Control Board. In order to be fully effective, the regulators will need to have a good understanding of the project management system.
- Request the regulators work jointly with DOE through all programmatic and OU-specific issues; it is believed that we can jointly then see first hand what the problems are. This can have several benefits which are (1) the project will move forward at a faster pace since work is being done on the problems at hand; (2) we will be more able to exercise the provisions of the IAG that address scope growth; (3) the fines and penalties that will be imposed will be minimal because of the progress made; and (4) ways to streamline the assessment and cleanup process at Rocky Flats will be jointly identified with the regulators.
- Request that the Quality Action Team effort be expanded to review the scope and schedule of all Environmental Restoration activities against available resources.

GAD-A14

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Again, I emphasize, all efforts should be directed at completing the necessary work while incorporating participation of the regulators. Our ultimate goal is to establish a realistic process for the identification and scheduling of firm milestones. Your staff may obtain further details regarding this approach through Headquarters Rocky Flats Environmental Restoration Program Manager, Autar Rampertaap.

  
R. P. Whitfield  
Deputy Assistant Secretary  
for Environmental Restoration

## CC:

J. Baublitz, EM-40  
R. Lightner, EM-45  
N. Larson, EM-45  
R. Greenberg, EM-453  
E. Livingston, EM-5  
M. McBride, RF  
J. Hartman, RF  
F. Lockhart, RF  
R. Schassburger, RF  
M. Roy, RF  
B. Faron, GC-11  
R. Kaltrider, EM-22



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500

DENVER, COLORADO 80202-2468

OPTIONAL FORM 10 (7-82)

AUG 12 1993

Ref: 8EWM-PF

Mr. James K. Hartman  
Assistant Manager for Transition  
and Environmental Restoration  
Rocky Flats Office  
U.S. Department of Energy  
P.O. Box 928  
Golden, Colorado 80402-0928

Post-It™ brand fax transmittal memo 7671		# of pages 3
To <i>Rock</i>	From <i>A</i>	
Co. <i>Rock</i>	Co. <i>A</i>	
Dept.	Phone #	
Fax #	Fax #	

Dear Mr. Hartman:

We have received your correspondence dated July 21, 1993, requesting that the "clock" be stopped on the schedules for Operable Units 1 through 7 until such time that the Department of Energy (DOE) receives and agrees to guidance on the methodology for the baseline risk assessments and preparation of the RCRA Facilities Investigation/Remedial Investigation Reports. Although we agree with the general need to stop work on risk assessments to the extent that such work is directly related to the aggregation of remedial investigation (RI) data, selection of contaminants of concern for both ecological and human health baseline risk assessments, and data aggregation for exposure assessment, we do not agree that the suspense date of June 21, 1993, applies to all referenced operable units, nor do we believe that DOE correctly invoked the Interagency Agreement (IAG) work stoppage provision.

Although you have not invoked the stop work procedures found in Part 24 of the IAG, we believe that it is appropriate to do so and as such in accordance with Part 24 of the IAG, EPA and CDH hereby request that the DOE stop work on the following portions of the baseline risk assessments for operable units 1, 2, 4, 5, 6 and 7:

1. Aggregation of RI data for the purpose of comparing to background concentrations,
2. Selection of the contaminants of concern for both ecological and human health baseline risk assessments, and
3. Aggregation of data for the purpose of conducting an exposure assessment.

EPA and CDH believe that the schedule "clock" should be stopped as of June 21, 1993, for operable units 1, 2, and 7 and as of the date of this letter for operable units 4, 5, and 6. As you know, the Dispute Resolution Committee (DRC) has previously

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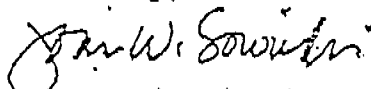
agreed to stop specific portions of the risk assessment work for operable unit 3 as of July 23, 1993 (See EPA's July 23, 1993 letter to CDE and DOE). EPA and CDE believe that stoppage of work is necessary until such time as an agreement is reached among the parties to the IAG on how the above issues as well as the statistical comparisons of RI data to background data will be resolved and implemented. We believe that if the above portions of work are allowed to proceed without agreement on background comparisons and selection of contaminants of concern, the remedy selection process is likely to be adversely impacted.

EPA and CDE expect that DOE will exercise diligence in achieving agreement among the parties on these issues. We believe that all parties must strive to reach this agreement within two months. We expect that other portions of the risk assessment, including but not limited to, data evaluation, identification of exposure scenarios, selection of exposure parameters, and ecological effects assessment will proceed as scheduled. However, once these issues are resolved, DOE shall evaluate and submit to EPA and CDE the impact to the above listed operable unit schedules associated with the diligent resolution of these issues in order to extend affected schedules pursuant to Part 42 of the IAG.

In your letter, you identified as an issue the "inclusion of non-waste management related activities." We are not clear what is meant by this reference. DOE is responsible under CERCLA for responding to the release of hazardous substances in the environment on DOE's facility and is responsible under RCRA for responding to the release of hazardous waste or constituents. CERCLA defines the term facility very broadly. If DOE does not intend to respond to hazardous substance or hazardous constituent releases associated with Rocky Flats, we need to discuss and resolve this issue immediately.

Pursuant to paragraph 163 of Part 24 of the IAG, work affected by this stoppage will immediately be discontinued for a period of up to five business days pending concurrence by the DRC. The DRC is to confer and meet as necessary during the five day period to attempt to concur on the need to stop work and the mechanism to re-start the work when it is appropriate to do so. Please contact Ms. Sowinski and Mr. Duprey at (303) 692-3359 and (303) 294-1720, respectively, to discuss the work stoppage and determine whether the DRC needs to meet formally to concur on this action.

Sincerely,



Joan Sowinski, Manager  
Hazardous Waste Control Program  
Colorado Department of Health



Robert L. Duprey, Director  
Hazardous Waste Management Division  
Environmental Protection Agency



cc: Martin Hestmark, 8EWM-FV  
Gary Baughman, CDR  
Richard Schassburger, DOE  
Joe Schieffelin, CDR  
Bruce Thatcher, DOE  
Bonnie Lavelle, 8EWM-FV

# memorandum

Rocky Flats Office

DATE: SEP 13 1993

REPLY TO  
ATTN OF: ERD:HR:10795

SUBJECT: Notice of Violation from the Environmental Protection Agency and the Colorado Department of Health on the Rocky Flats Interagency Agreement, Operable Unit 2

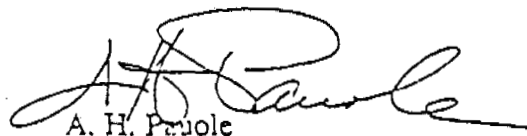
TO: Associate Deputy Secretary for Field Management, FM-1, HQ  
General Counsel, GC-1, HQ  
Assistant Secretary for Environmental Restoration and Waste Management, EM-1, HQ  
Assistant Secretary for Environment, Safety and Health, EH-1, HQ

In compliance with the August 18, 1993, guidance from the Secretary on Reporting Procedures for Enforcement Actions Related to Violations of Environmental Requirements, this memorandum provides notification that a Notice of Violation (NOV) has been formally submitted to the DOE Rocky Flats Office.

The violation relates to missing a previous Interagency Agreement (IAG) milestone date on Operable Unit 2 for the delivery of the Draft RCRA Facility Investigation/Remedial Investigation Report (RFI/RI) which was due on March 12, 1993. A request for extension on this Draft Report was denied by the regulatory agencies and a NOV was issued on March 16, 1993. The IAG required the submittal of a Final Report on August 9, 1993. The regulatory agencies also denied a request for extension on this Final Report and have now issued a second NOV.

Rocky Flats has expedited the schedule for delivery of the Draft and Final Reports and planned delivery on December 16, 1993, and May 21, 1994, respectively. Although Rocky Flats does not deny the authority of the Environmental Protection Agency and Colorado Department of Health (CDH) to impose fines and penalties on the first missed milestone for the Draft Report, there is a strong argument against imposing further penalties for missing the Final Report. Rocky Flats had requested and received the approval of the regulatory agencies to "Stop the Clock" on all Remedial Investigation Report activities as of June 21, 1993, for Operable Unit 2 until risk assessment issues were resolved. Resolving this issue will further impact the planned completion dates for both reports identified above.

DOE is liable for penalties of up to \$5,000 for the first week and up to \$10,000 for every week thereafter for noncompliance on each milestone missed under the IAG. The Notice of Violation for the Final RFI/RI Report was issued to the Department of Energy since the Management and Operating (M&O) contractor is not a party to the agreement. CDH has the authority to issue a comparable NOV to the M&O under the RCRA permit, but has not yet done so.



A. H. Penole  
Acting Manager

7 Attachments:  
Background letters



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RECEIVED REGION VIII  
U.S.D.O.L. 899 18th STREET - SUITE 500  
R.F.C. - MAIL ROOM DENVER, COLORADO 80202-2460

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Ref: 8HWM-FF

Mr. Richard J. Schassburger  
Rocky Flats Office  
U.S. Department of Energy  
P.O. Box 928  
Golden, CO 80402-0928

Re: Notification of Violation and  
Accrual of Stipulated Penalties for  
Failure to Submit Final RFI/RI  
Report for Operable Unit 2

Dear Mr. Schassburger:

We are in receipt of your letter regarding the Final RFI/RI Report for Operable Unit 2 (letter is undated but is identified by DOE reference number 93-DOE-08698). As you noted in your letter, the agreed upon milestone date for submittal of the Final RFI/RI Report for Operable Unit 2 was August 9, 1993. By failure to submit that document to EPA and CDH, DOE has not met the milestone and is in violation of the IAG.

Since the Final RFI/RI Report for Operable Unit 2 is a primary document, you are hereby notified that stipulated penalties are accruing pursuant to Part 19 of the IAG. In accordance with the terms of the IAG, penalties will begin to accrue on the date DOE receives this notice of violation. The stipulated penalties shall accrue from the date of DOE receipt of this notice of violation until DOE submits to EPA and CDH an approvable Final RFI/RI Report for Operable Unit 2. These penalties are in addition to stipulated penalties already accruing for DOE's failure to submit the Draft RI/RI Report for Operable Unit 2.

As agreed in the IAG, a stipulated penalty may be assessed in an amount not to exceed \$5,000 for the first week and \$10,000 for each additional week for which a failure occurs. Also in accordance with the terms of the IAG, DOE shall have 15 days after receipt of this notice of violation to invoke dispute resolution on the question of whether the failure did in fact occur.

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DEC 15 09 10L 1410

If you have any questions regarding this matter, please call Martin Hestmark (EPA) at 294-1134 or Joe Schieffelin (CDH) at 692-3366.

Sincerely,

*Arthur D. Hestmark*

Martin Hestmark, Manager  
Rocky Flats Project  
EPA, Region VIII

*Gary W. Baughman*

Gary Baughman, Chief  
Facilities Section  
Hazardous Waste Control Program

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cc: ~~James K. Hartman, DOE~~  
Robert Carr, OFFE  
Gary Baughman, CDH